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Supreme Court of the United States

OCTOBER TERM 1946

No. 435

ANNA C. DICKHEISER and EDWARD S. BIRN, on their own behalf and on behalf of all other stockholders of THE PENNSYLVANIA RAILROAD COMPANY, one of the defendants herein,

Petitioners,

against

THE PENNSYLVANIA RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; M. W. CLEMENT, C. JARED INGERSOLL, ARTHUR C. DORRANCE, THOMAS S. GATES, RICHARD K. MELLON, LEONARD T. BEALE, PIERRE S. DUPONT, D. R. MCLENNAN, FRANKLIN D'OLIER, ROBERT T. MCCRACKEN, THOMAS NEWHALL, JAMES E. GOWEN, RICHARD D. WOOD, J. F. DEASY, WALTER S. FRANKLIN, J. R. DOWNES, GEORGE H. PABST, JR., THE PENNROAD CORPORATION, IONE M. OVERFIELD, GRACE STEIN WEIGLE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

ARCHIBALD PALMER,
Counsel for Petitioners.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show to the Court as follows:

This is a petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals

for the Third Circuit, entered in the above cause on the 27th day of May, 1946, affirming a final decree of the District Court of the United States for the Eastern District of Pennsylvania, which granted the motion of the defendant-directors for a summary judgment under Rule 56 and dismissing the action as to the defendant Pennroad Corporation for failure to state a claim upon which relief could be granted.

Opinions Below

The opinion of the District Court of the United States for the Eastern District of Pennsylvania is reported in 5 F. R. D. 5 (E. D. Pa. 1945).

The Circuit Court of Appeals wrote no opinion.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1945.

Statement of Facts

A stockholders' suit seeking restitution for the wrongdoings of the Pennsylvania Railroad Company and the Board of Directors of the Pennroad Corporation, as well as its former directors, was filed in Delaware in October, 1932 by Julia A. Perrine and her brother, Joseph W. Perrine. That case never proceeded to trial for the chief reason that the individual defendants named herein were non-residents of the State of Delaware and at all times evaded service of process. In 1936 Daniel W. Hastings became counsel for the complainants, Julia A. Perrine and Joseph W. Perrine. In 1938, the United States Senate Committee, including among its members the present President of the United States, investigated the relationship of the Pennsylvania

Railroad Company and the Pennroad Corporation and for the first time spread upon the record and exposed to public gaze the history of Pennsylvania's manipulations of Pennroad.

As a result of the formation of a stockholders' committee Mr. Kenneth Guiterman, on behalf of Ione M. Overfield, in August 1939, commenced a stockholders' derivative suit against the defendants in the District Court of the United States for the Eastern District of Pennsylvania. To this suit there was joined another complaint, filed by Grace S. Weigle by her counsel, Daniel W. Hastings, in the same court, against the same defendants. Together these suits included all of the wrongful transactions which originally formed the basis of the suit in the Perrine case. Weigle's bill complained of eight purchases made by the Pennroad Corporation and consummated by it pursuant to a scheme to employ its funds for the benefit of the Pennsylvania Railroad Company, to the damage of Pennroad. Overfield's complaint, prior to amendment, complained of only one of the transactions set forth in Weigle's bill, that grew out of the freight forwarding project. The Weigle suit was filed on June 7, 1937; the Overfield on March 30, 1939. Jurisdiction in both suits was based upon diversity of citizenship. On February 10, 1941, the District Court made an order consolidating both cases and proceeded to trial. Four days later Overfield asked leave to intervene as a party plaintiff in the Weigle suit, submitting with her motion a petition asserting that she adopted the eight causes of action set out by Weigle. The District Court allowed the intervention. The trial consumed seventy-eight trial days. The record was of unusual length. The appendix was in excess of ten thousand pages. Many of the pertinent facts will be found in the opinion of the District Court reported at 42 Fed. Supp. 586 and 48 Fed. Supp. 1008. On January 19, 1943, the District Court Judge rendered a judgment in favor of the complainants in the sum of $22,104,515.92. On appeal the Circuit Court of Appeals reversed the lower court judg-

ment in a decision rendered on December 28, 1944 (146 Fed. [2d] 889). The time for filing petitions for rehearing with the Circuit Court of Appeals was extended from time to time, upon application of counsel for the plaintiffs in the Overfield and Weigle suits, the most recent extension was to June 15, 1946.

Shortly after the decision of the Circuit Court of Appeals was announced in the Overfield and Weigle suits initial steps were taken by counsel for the plaintiff in the Perrine suit for an early trial of their suit. Negotiations were suddenly instituted between emissaries of both Pennroad and Pennsylvania Railroad in January and February of 1945.

It appears that after discussion between the defendant Robert T. McCracken and Charles Thompson, whose law firm represented several estates of former directors of the Pennroad Corporation, Mr. Thompson contacted Mr. Pepper, president of the Pennroad, for the purpose of discussing the possibility of a settlement of the Pennroad litigation. This was about January 17, 1945. Mr. Hastings informed Mr. Pepper that he saw no reason why Mr. Pepper should not confer with Mr. McCracken concerning settlement of the litigation. On Saturday, January 20, 1945, while in New York, Mr. Hastings received a telephone call from Mr. Pepper advising him that on the following Monday he would have an offer of $12,000,000 from the Pennsylvania Railroad Company. On Monday, January 22, 1945, Mr. Hastings stopped at the Pennroad office in Philadelphia and was told by Mr. Goodall that the offer would be received that day; this was confirmed by a telephone call to his office in Wilmington that same afternoon. Thereupon Mr. Hastings kept in touch with his associates, Mr. Marshall, Mr. O'Donnell, and others, and the offer was discussed by them all of the next day, Tuesday, January 23, 1945.

At this time, the group decided that the offer of $12,000,000 was not acceptable. The serious reasons for the objection, as stated by Mr. Hastings, were as follows:

"In the first place, it had been conducted by the officers of the Pennroad Corporation, and neither me nor my associates had anything to do with it, and a matter of a little personal pride or jealousy, or what not, caused us to believe that we ought to be in that conference before any decision was reached. I couldn't answer the questions that my associates put to me with respect to it, because I had not been in the conference which negotiated the question. So we reached the conclusion that we would not agree to twelve million dollars" (202).

It appears that when Mr. Hastings had conferred with Mr. Goodall in Philadelphia, on Monday, January 22, 1945, it was suggested by Mr. Goodall that the matter be put up to the board of directors. Mr. Hastings agreed with the suggestion and Mr. Goodall asked him to be present to meet with the board on Thursday, January 25, 1945. At the meeting of the board, Mr. Goodall enlightened the board as to what had taken place and Mr. Pepper explained the negotiations. Mr. Hastings objected to the position that the board had assumed in this matter of settlement and pointed out that the responsibility devolved upon counsel to bring about any settlement "agreement". Just what part had been played up to this point by Mr. Wolf in the settlement negotiation was not explained by Mr. Hastings in his testimony before the Chancellor, but it appears that Pepper had taken up the propriety of his conference with Mr. McCracken of Pennsylvania with Mr. Wolf as well as Mr. Hastings. At the board meeting, Mr. Hastings suggested that the emissaries of Pennroad get in touch with Mr. McCracken and request him to contact counsel for Pennroad and counsel for the stockholders. Within a day or two after the board meeting, Mr. Wolf informed Mr. Hastings that Mr. McCracken desired to confer with the two of them and would also invite Mr. Dickinson of Pennsylvania to be present. At this conference, Mr. Hastings and Mr. Wolf acting on behalf of Pennroad, reached the conclusion that they would be very glad to take 75% of

the judgment which Judge Welsh had given in favor of Pennroad plus interest, amounting to about $18,500,000, and this figure was suggested to the Pennsylvania representatives (206). Soon after this conference, Mr. Wolf and Mr. Hastings made an arrangement to see Judge Welsh for the purpose of discussing the settlement offer. This was done apparently for the reason that Mr. Hastings was under the impression that the Overfield-Weigle case, could be referred back to Judge Welsh for the purpose of passing upon the adequacy of the settlement. This conference with Judge Welsh then was dictated solely because it was believed that Judge Welsh would eventually be the jurist who would be passing upon the adequacy of any settlement which Pennsylvania might offer. As Mr. Hastings himself said:

> "* * * I went to the Judge who knew all about it, who knew about the decisions in the Circuit Court, to inquire of him whether as an officer of his Court he thought that under certain circumstances I ought to recommend the settlement be submitted to him for approval" (209).

At this conference, Mr. Hastings notified Judge Welsh that he did not feel the offer of $12,000,000 was adequate. He then had some conversation with Mr. Pepper who notified him that Mr. Goodall and Mr. Wolf were pursuing the matter with Mr. McCracken and Mr. Dickinson of Pennsylvania. Mr. Pepper told him that Pennsylvania thought any further effort to settle should come from Pennroad and that since the offer of $12,000,000 was unacceptable, Pennroad should state what kind of an offer could be recommended. The settlement negotiations were thereby passed back to Mr. Hastings and his associates (213). Consultation among Mr. Hastings and his associates resulted in a decision to make an offer of 75% of the Welsh judgment without interest or approximately $16,578,000 (214). This offer was made to Mr. McCracken by Mr. Hastings in a letter dated February 12, 1945 (215).

The Pennroad board on February 14, 1945, convened for the purpose of discussing the settlement negotiations and at this time, Mr. Hastings was prevailed upon to reduce the figure to $15,000,000 (219). Once more he consulted Judge Welsh to ascertain whether he thought that if such an offer was made by Pennroad, it should be submitted to him for approval. Once again it is apparent that Mr. Hastings thought that the Overfield-Weigle cases were the subject matter of the settlement and that the Federal Court in Pennsylvania was the proper forum in which to present any settlement "agreement". The board of directors met again the afternoon of February 14th and adopted a resolution approving a $15,000,000 settlement. Mr. Hastings refrained from voting on the motion because he had to consult associates and moreover felt that he had to present the "agreement" to Judge Welsh (222). Thereafter Mr. Hastings and his associates agreed to the settlement of $15,000,000 and he suggested to Mr. Wolf that since Pennsylvania was paying the bill and getting the releases they ought to draw the necessary papers. When Mr. Hastings examined the papers, however, much to his surprise they provided for the settlement of the Perrine suit. As has been previously indicated, it was his thought that the Third Circuit Court of Appeals upon proper petition would be requested to return the Overfield-Weigle case to Judge Welsh for the purpose of having him pass upon the compromise, which, of course, is in accord with the Federal Rules of Civil Procedure. "Cogent reasons" were advanced for this proposed plan but Hastings stated that it would be impossible to get his associates to agree to it unless all parties to the settlement would agree that Judge Welsh should pass upon the matter of fees. Mr. Wolf and Mr. Hastings again conferred with Judge Welsh and asked him to act as an arbitrator in the matter. Judge Welsh agreed to serve in that capacity.

Before any final approval was given by Mr. Hastings to this settlement agreement, however, he not only secured the services of Judge Welsh, acting not as a Federal Judge

but as an individual in the matter of awarding fees, but he also secured a contract from Pennroad providing for the payment of not more than 20%—or $3,000,000—and further providing that all attorneys who so desired could go before Judge Welsh and have the matter of fees determined. The contract which was produced before the Chancellor, also provided that there should be no right of appeal from any award of fees.

It is apparent then that Hastings has played the dominating role in this settlement "agreement" and indeed throughout the course of the entire litigation of the stockholders' claims for the alleged wrongs of Pennsylvania. It was not until Hastings secured the free contract and had obtained the assurance of Judge Welsh that he would act as arbitrator of fees that he finally withdrew his objection to the offer of $15,000,000.

One of the considerations made part of the bargain was the termination of the Overfield-Weigle case, which was still pending for rehearing through a policy of agreed inaction on the part of the Pennsylvania and Pennroad. The settlement agreement was filed in the Chancery Court of the State of Delaware in March of 1945 for the purpose of obtaining the approval from that Court and, also, authorization for carrying into execution the provisions of the contract. Paragraph "3." of the contract reads as follows:

> "That prior to the said payment, the two suits in the Federal Court, above referred to as the Overfield and Weigle cases, shall have been so disposed of that the Mandate of the United States Circuit Court of Appeals for the Third Circuit now directed to be entered shall forthwith go forward to the United States District Court for the Eastern District of Pennsylvania, and the bill dismissed in accordance therewith, but without costs, and the time for applying for certiorari therefrom shall have elapsed."

On or about April 20, 1945, the complaint in the present case was filed. The complaint in substance charges that the agreement of settlement between Pennroad and the

Pennsylvania Railroad is the result of a conspiracy among the defendants, along with counsel for the plaintiffs in the Pennroad suits, to dissipate the assets of the Pennsylvania Railroad to the extent of $15,000,000 and without any reasonable or justifiable basis therefor, and that the approval of the agreement of settlement by the defendant directors of the Railroad Company was in reckless disregard of the interests of the Railroad Company and constituted a breach of their duties as such directors. The essence of plaintiffs' contention in this complaint is that the decision of the Court below in the Overfield-Weigle suits is determinative of the Perrine suit in the Delaware state courts and bars liability in that suit, and that therefore there was no reasonable basis for settlement of the Perrine suit. The complaint seeks to enjoin consummation of the settlement, or, in the alternative, to recover damages from the defendant directors if the agreement should be carried out. The answer of these defendants points out, among other things, that the lower Court's decision in the Overfield-Weigle suits was based solely on the applicable statute of limitations, which is a different statute from that applicable in the Perrine suit in the Delaware courts; that the Perrine suit was begun in 1932, shortly after the time of the transactions complained of and at least seven years before the Overfield-Weigle suits were begun; and that on the basis of these and other factors counsel had advised these defendants that there was no certainty that the Perrine suit could be successfully defended for the Pennsylvania Railroad.

Following the filing of defendants' answer, counsel for petitioners herein, under Rule 26 of the Federal Rules of Civil Procedure, served notice for the taking of depositions of most of the defendant directors and of other persons. As a result of this procedure petitioner's counsel, during five full days of taking depositions, obtained the statements of twelve of the defendant directors of the Railroad Company, these being all the directors of the Railroad Company who were available for that purpose and, with two excep-

tions, all the directors who participated in the approval of the settlement agreement. Petitioners' counsel also obtained the depositions of numerous other persons who were in one way or another involved in or concerned with the settlement agreement and the negotiations leading up to it. All of these depositions were before the District Court, in the form of affidavits in support of a motion by these defendants for summary judgment in their favor. In addition, there were before that Court the affidavits of the two remaining directors of the Railroad Company, Messrs. duPont and Newhall, who participated in the approval of the settlement agreement but were not available for the taking of depositions, reciting in full their participation and their reasons for approving the settlement. The District Court thus had before it the statement of every one of the directors of the Railroad Company, with the exception only of one director, Mr. McLennan, who had died before the settlement in question was proposed, and two other directors, Messrs. Mellon and D'Olier, who, because of participation in the affairs of the United States Government, were absent from the directors' meetings which considered the proposed settlement and in no way participated in the consideration or approval of it.

In addition to thus having before it the statement, under oath, of every director of the Railroad Company who participated in the consideration of the matter at issue, the District Court had before it the statement, under oath, of every other person who had a substantial part in the negotiations leading up to the settlement, including among others the general counsel, the comptroller, the secretary and the treasurer of the Railroad Company, and counsel for the Pennroad Corporation who handled the settlement in its behalf.

The plaintiffs found it necessary to examine other persons who were concerned with the settlement agreement and on account of a motion made by the defendant-directors of Pennsylvania for summary judgment counsel did not proceed with the examination of Mr. Goodall, Chairman of

the Pennroad Board of Directors, Benjamin F. Pepper, President of Pennroad, and John H. Mason, Chairman of the Board of Janney & Company, of New York City, and a director of Pennroad.

In an amendment which the District Court allowed the plaintiffs to make to their complaint, the plaintiffs charged that the defendant directors were derelict in their duty by reason of their failure to seek restitution from the estates of those former directors of the Pennsylvania Railroad who, as directors of the Pennroad, participated in the formation of Pennroad.

Questions Presented

1. Did the defendant directors act in good faith or employ the requisite diligence and prudence, as directors, in approving the settlement agreement and in failing to seek from the estates of the former directors of the Railroad Company who, as directors of Pennroad, participated in its formation, restitution for the amount agreed to be paid to the Pennroad in the settlement agreement?

2. Did the failure to submit the settlement agreement to the District Court for the Eastern District of Pennsylvania for its approval and to follow the procedure prescribed in Rule 23(c) of the Federal Rules of Civil Procedure, constitute a violation of the law and render the agreement invalid?

3. Did the learned Court below err in holding that on the record before the District Court it was proper to apply the summary judgment rule and that the plaintiffs should not have been permitted to take the case to trial?

4. Did the Court below err in holding that the District Court properly dismissed the action brought against Pennroad for failure to state a claim against it upon which relief could be granted?

Specifications of Error to Be Urged

The Court below erred:

1. In holding that there was no basis for the charge that the defendant directors were guilty of fraud or neglect of duty in approving the settlement agreement and in failing to seek restitution from the estates of the former directors;

2. In holding that the defendant directors acted honestly and in good faith, and on reasonable grounds, in approving the settlement agreement with Pennroad, relying on the oral assertions of good faith;

3. In holding that the Railroad Company was not legally entitled to recover from the estates of the deceased Pennroad directors and that the defendant directors were not derelict in their duty in (a) not seeking such recovery; and (b) including in the agreement a release of those estates from Pennroad's claims;

4. In holding that the settlement agreement is not in violation of Rule 23(c) of the Federal Rules of Civil Procedure because not submitted to the Federal District Court for its approval;

5. In holding that the defendant directors' motion for summary judgment could properly be granted on the record before it;

6. In holding that the Pennroad Corporation was not a proper and necessary party to the action and that the bill of complaint failed to state a claim against it under its relief as demanded.

Reasons for Granting of Writ

I

The decisions of the Court below are in substantial conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit.

In *In re Arnstein* v. *Porter,* 154 F. (2d) 464, the Circuit Court for the Second Circuit held that summary judgment based upon depositions is improper and a trial indispensable, notwithstanding that the plaintiff in the matter presented by his affidavits offered nothing to discredit the honesty of the defendant. The Court further held that the rule authorizing summary judgment was not designed to foreclose the plaintiff's privilege of examining the defendant at a trial, especially as to matters peculiarly within the defendant's knowledge. In the case at bar the Circuit Court of Appeals has held in effect, that despite the fact that the credibility of the defendants is crucial and vital, summary judgment based on depositions is proper and a trial could properly be dispensed with, presumably upon the ground that the plaintiffs offered nothing to discredit the honesty of the defendants. In the case at bar the Circuit Court of Appeals for the Third Circuit, in affirming the judgment of the District Court, held, in effect, that the rule authorizing summary judgment was designed to foreclose plaintiffs' privilege of examining the defendants at a trial, especially as to matters peculiarly within the defendants' knowledge. It appears that there is a conflict of authority on the question of whether the Federal Rule authorizing summary judgment permits a trial by affidavits if either party objects.

Even if "there is the slightest doubt about the facts" the plaintiff is entitled to a trial.

> *Doehler Metal Furniture Co.* v. *United States,* 149 F. (2d) 130, 135 (C. C. A. 2nd);

Sartor v. *Arkansas Natural Gas Corp.*, 321 U. S. 620;
Arenas v. *United States*, 322 U. S. 419, 434;
Toebelman v. *Missouri and Kansas Pipe Line Co.*, 130 F. (2d) 1016, 1018 (C. C. A. 3rd);
Associated Press v. *United States*, 326 U. S. 1, 6-7.

That such doubt exists in the case at bar is amply supported in view of the gravamen of the complaint.

(a) That the defendant directors did not act in good faith and employ such diligence, sagacity, vigilance and prudence as in general prudent men of discretion and intelligence in like matters employ in their own affairs.

(b) That the defendant directors were guilty of gross negligence and breach of trust in failing to seek restitution from the estates of the former directors.

The power of the defendant directors to compromise a lawsuit is subject to the same limitations as are all other powers of directors. They may not settle *negligently*, nor in *bad faith*, nor for the *benefit of third parties*, but their settlement must be a bona fide act done for the benefit of the Railroad. *Hill* v. *Wallace*, 259 U. S. 44 (1922).

The situation here is similar to that in *Independent Order of Foresters* v. *Scott*, 223 Iowa 105 (1937). There, as here, the defendants contended that where directors settled or compromised a dispute in which the corporation was involved, the minority stockholders could not ask for judicial review. But the Court emphatically rejected this contention, pointing out that there are limits to the powers of directors to settle a lawsuit and that these powers are always subject to review by the Courts. The Court said (p. 116):

> "Assuming that the compromise settlement did involve a question of internal policy and management, it would be subject to review by the courts under petitioner's admitted exceptions to the rule."

Each of the issues—negligence and bad faith—is an issue of fact. If there is a trial, the conclusions on those issues of the trier of the facts would bind this Court on appeal, provided the evidence supports those findings, regardless of whether this Court would have reached the same conclusions.

It was urged by the plaintiffs in the lower Court that the defendants were guilty of breach of trust of their fiduciary duties in that the Perrine suit did not constitute a dangerous threat to the Pennsylvania Railroad and was not in fact taken seriously in the past by the Pennsylvania; that the directors had no right to waive certain legal rights of the Pennsylvania and that the Pennsylvania having won after many years of long, bitter and protracted litigation the Overfield and Weigle suits, acted improperly and wrongfully in failing to obtain a ruling on the petition for rehearing by this Court of its decision in the Overfield and Weigle suits; that all of the directors with the exception of Robert T. McCracken were not adequately informed as to the facts regarding the litigation of the proposed settlement of it; that in approving the agreement of settlement, the directors were principally motivated by the possibility of effecting a large tax saving to the railroad company through the deductibility of the amount paid, as a business expense; that the inclusion in the agreement of settlement of a provision releasing the estates of the deceased directors of Pennroad from Pennroad's claims of liability and the purchase of the releases with funds belonging to Pennsylvania was contrary to the interests of the Pennsylvania; that the agreement of settlement in providing that it shall be subject to the approval of the Delaware Court of Chancery and failing to provide for the approval of the Federal Court for the Eastern District of Pennsylvania, is in violation of Rule 23(c) of the Federal Rules of Civil Procedure.

Summary judgment was then improper if the defendant directors did not act in good faith or acted negligently. On these issues, the District Judge, who heard no oral tes-

timony, had before him the depositions of the defendants and other persons who were in one way or another involved in or concerned with the settlement agreement and negotiations leading up to it and the affidavit of Archibald Palmer, counsel for the plaintiffs.

The Judge obviously accepted the statements of the defendant directors contained in the affidavits submitted by them that they acted honestly and in good faith for their corporation.

If after hearing all the evidence, the Court disbelieved defendants' denials that they acted in bad faith, or acted negligently, he could from such facts enjoin the payment of the $15,000,000. It follows that, as credibility is unavoidably involved, genuine issues of material facts exist. Plaintiffs have been deprived of the privilege of cross-examining the defendants. Counsel for the plaintiffs may at such examination elicit damaging admissions from the defendants and plaintiffs may persuade the trier of the facts, observing the manner of the defendants when testifying, that the defendants made the settlement in bad faith and performed their duties in a negligent manner.

> Mr. Justice Douglas, *Directors Who Do Not Direct,* 47 Harv. L. Review 1305, 1325, 1326.

Of course, plaintiffs examined defendants on deposition, but the right to use depositions for discovery, or for limited purposes at a trial, does not mean that they are to supplant the right to call and examine the adverse parties, if they are available, before the Court; for the demeanor of witnesses is recognized as a highly useful method of ascertaining the truth.

In *Napier* v. *Bossard,* 102 F. (2d) 467, 468-469 (C. C. A. 2nd), the Court said:

> "A deposition has always been, and still is, treated as a substitute, a second best, not to be used when the original is at hand."

It has often been said that the oral testimony of a witness, in the presence of the Court and jury, is much better than his deposition can be.

In *Untermeyer* v. *Freund,* 37 F. 342, 343, Coxe, J., noted that:

> "A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression."

In *Pinson* v. *Atchison, T. & S. F. R. Co.,* 54 F. 464, 465, the Court said:

> "It is sometimes difficult and impossible to get so full, explicit and perspicuous a statement of facts from the witness through a deposition as it is by examination before court and jury."

See also:

> *Moore, Facts* (1898), Secs. 963, 967, 991-995.

Where, as here, credibility is crucial, summary judgment becomes improper and a trial indispensable.

The following excerpt from the minutes of the meeting on February 14, 1945, is significant for the reason that it is evident that the Overfield and Weigle suits were being settled and not the Perrine suit (Willcox Deposition, pp. 298-300):

> "* * * As a result of these various conferences Senator Daniel O. Hastings, one of the counsel for the plaintiffs, submitted the figure of $16,578,000.00 in final settlement and satisfaction of all claims which the Pennroad Corporation or its stockholders might have against this company or any of its directors and the discontinuance of all proceedings based thereon, *including the Perrine suit in Delaware.* * * *" (Italics ours.)

The following excerpt of the minutes of the meeting of February 28, 1945, at which the settlement agreement was

formally approved, is also highly significant (Willcox Deposition, pp. 319-324):

> "By the terms of this draft agreement a payment of $15,000,000.00 by this company would be made *in full settlement of all present litigation* and the settlement would be made subject to the approval of the Chancery Court of Delaware."

In the first instance, corporate minutes are evidence of the matters therein recited. They are competent prima facie evidence, presumed to be complete, and the best evidence of the transactions at a directors' meeting.

Fletcher states the rule with respect to corporate records thus (5 Fletcher Cyc. Corp. [Perm. Ed.], Sec. 2196):

> "It is not to be questioned that, generally speaking, books and records kept by a corporation in the regular course of its business are admissible in evidence to the same extent and under the same conditions as other private books and records. And it is the general rule that such original books and records, if they are in existence and can be produced, are prima facie evidence of the matters recorded therein. * * *
>
> * * * the original books and records of a private corporation, when properly authenticated, are the best evidence of its acts, resolutions and proceedings, * * *."

And Thompson adds (3 Thompson on Corporations [Third Ed.], Sec. 1962):

> "The minute book is evidence both that its contents are correct and that presumptively, proceedings not recited therein did not actually occur. * * *."

In *Gentry-Futch Co.* v. *Gentry,* 90 Fla. 595 (1925), the minutes of a stockholders' meeting were introduced in evidence for the purpose of showing, among other things, that certain stockholders were present by proxy, the minutes containing an entry to this effect. Holding that the minutes were properly admitted, Brown, J., said (pp. 609-610):

> "Ordinarily, the minutes of corporate meetings are prima facie evidence, and usually held to be the best evidence of what they purport to show as to the corporate business transacted at such meetings."

All of the recitals in the minutes are material evidence. As Miller, J., said in *Friend* v. *Hamill,* 34 Md. 298, 308 (1870):

> "Where the question is, whether a party has acted prudently, wisely, or in good faith, the information (sic) on which he acted, whether true or false, is original and material evidence and not mere hearsay" (Cf. 3 Wigmore on Evidence [2nd Ed.], Sec. 1789; also Sec. 1732 [3]).

The reason for this rule is plain. The real plaintiff in this action is the Railroad, and the nominal plaintiffs' rights are wholly derivative. The minutes are corporate records of the Railroad, kept by the officers in the course of their official duties. They are not records belonging to the individual directors. They are, therefore, records of the real plaintiff, kept by its officers as part of their official duties. To make false entries in them would constitute forgery. If the minutes tend to substantiate an action against the directors, they might be offered in evidence against them. "Wherever there is a duty to record official doings, the record thus kept is admissible" (3 Wigmore on Evidence [2nd Ed.], Sec. 1639).

Whether they are used by or against the directors, there can be no question that the minutes are the official records of the real plaintiff in this action and are prima facie evidence of the matters recorded therein, and the best evidence of the directors' proceedings.

In the instant case, it will not do to say that the plaintiffs have offered nothing which discredits the honesty of the defendants in approving the settlement agreement, and hence, the latter's deposition must be accepted as true. Rule 56 was not designed to foreclose plaintiffs' privilege

of examining defendants at a trial, especially as to matters peculiarly within their knowledge. We do not believe that, in a case in which the decision must turn on the reliability of witnesses, the Supreme Court, by authorizing summary judgments, intended to permit "a trial by affidavit" if either party objects. *Grave injustice might easily result.* In equity practice in the Federal Courts before 1912, extensive use had been made of deposition testimony. But Rules 46 and 47 of the Equity Rules of 1912 expressly provided that in "all trials in equity the testimony of witnesses shall be taken orally in open court", unless there was a "good and exceptional cause for departing from the general rule".

Lane, The Federal Equity Rules, 46 Harv. L. Rev. (1933) 638, 651.

The aim of present Rule 56 was not to restore in equity the old practices abolished in 1912. That such was not the purpose appears from Rule 43(a) which provides that "the testimony of witnesses shall be taken orally in open court", except in unusual circumstances.

Moore, Federal Practice (1938), 3064, 3066, 3189.

To illustrate the injustice done to the plaintiffs in awarding summary judgment to the defendants and depriving the plaintiffs of a trial, we direct the attention of the Court to the statements made by several of the defendant directors at their examination before trial which are at variance with the statements contained in the minutes of the corporation hereinabove referred to.

When Mr. Clement, president of Pennsylvania, was examined before trial he testified that the decision of the Circuit Court of Appeals reversing Judge Welsh was a great source of satisfaction to him (p. 8); that he was well aware of the fact that Pennsylvania did not owe any money to Pennroad; that in the month of January, 1945, Mr. McCracken informed him that he had been approached by Mr. Thompson on the subject of settling the situation

(p. 10); that he was seriously concerned about the Perrine suit where there was no statute of limitations, and "that is the case that is settled here" (p. 13); that he was not aware of the fact that Mr. Southerland, who represented Pennsylvania in the Perrine suit, had made a statement to the Chancellor in the course of the hearing on the petition of Pennroad for the approval of the settlement agreement; that Pennsylvania did not owe any money to Pennroad (p. 15); that the reason for settling the Perrine suit was that Pennsylvania was "in good cash position, in good earning position", and that he considered that the settlement of the case would be in the best interest of Pennsylvania (p. 21) (when counsel for the plaintiffs read the judgment of the Circuit Court of Appeals to him); he said "that has to do with this suit down here and we are settling the suit in Wilmington" (p. 28); that he considered every one of the suits a strike action (p. 30); that he was advised by Mr. McCracken and Mr. Dickinson to consider settlement of the Perrine suit; that Mr. McCracken and Mr. Dickinson explained the situation to the directors at a meeting of the board; that he recommended to the board that if the suit could be settled within the limits recommended by counsel, counsel should be empowered to continue to discuss settlement; that Mr. Dickinson and Mr. McCracken had agreed "that we were settling the case in Delaware" (p. 56); "I am telling you that this was the settlement of the suit in Delaware, that is the suit we are settling" (p. 57); that he knew Pennroad stockholders were taking a cross-appeal; that if the settlement were made this year, and it was a deductible item of expense, then in view of the fact that Pennsylvania was in the excess profits tax class, the cost to Pennsylvania would be around 15% (p. 69); (when he was asked about restitution from the former directors); he knew nothing about that (p. 94); that he had obtained opinions from tax counsel in Mr. Dickinson's office, as well as tax counsel in the office of Mr. McCracken (p. 105); that "the case was never to be settled in the Federal Court

from the very inception, and the question of this suit in Wilmington was the one that brought it up" (p. 105); that if the settlement took place in Wilmington, it would constitute a current expense (pp. 107, 110); that in searching for the reasons for settlement of the Perrine suit in Delaware, the attention of the Court is directed to the testimony given by Hastings before Vice-Chancellor Pearson, which appears in the record (pp. 111, 112); that the reasons given by Mr. Wolf, counsel for Pennroad, for the settlement of the Perrine suit also appears in the record (pp. 114, 117); that the main reason for the settlement was the deduction of the settlement payment as a business expense, for Federal Income Tax purposes and thereby effect a large tax saving (p. 140).

Mr. McCracken testified that he was a director of Pennsylvania and played a leading part in the transaction, by reason of his acting as counsel for Pennsylvania; that he had also appeared as counsel for Pennroad in the Overfield case and had invoked the venue statute (p. 156); and that the Court of Appeals held that the Delaware Court was without the means of affording a convenient, efficient and just determination of the case with respect to essential parties charged with wrongdoing (p. 156); that on the 12th day of January, 1945, he met Mr. Thompson who asked him if he would consider settling the Perrine case in Delaware, to which he replied in the affirmative, and authorized Thompson to take up the matter of settlement with Mr. Pepper (pp. 223, 227); that he told Hastings that he was not settling the case in Pennsylvania (pp. 228, 903); that he told Hastings that he had investigated the tax situation and that the expenditure of $15,000,000 would be much more likely to be allowed by the taxing authorities if the case was settled in Delaware; that the Perrine suit was a strike suit (p. 242); that he was authorized by Clement to offer $7,500,000; that he thought the case was worth $15,000,000 (p. 244); that he made a fair offer of $12,000,000 (p. 245); that he was not awfully proud of the settlement

(p. 252); that the Perrine suit was brought baselessly. Pennsylvania owed nothing to Pennroad (p. 263); *that he was settling the Perrine suit* (p. 331); that he appeared before the directors; that "we never considered settling in any other way except in Delaware" (p. 352); that there was a case pending there (pp. 354, 356, 358); "And we were from the beginning settling the suit in Delaware" (p. 358); that all of the allegations in the Perrine suit were false (pp. 847-885, inc.); that he investigated the possibility of deducting the settlement payment as a business expense, for Federal Income Tax purposes in the month of January, 1945 (p. 909); that he was settling the Perrine case (pp. 911, 912, 913).

Mr. Deasy, vice-president and director of Pennsylvania, testified:

> "Q. So that at that time the discussion was to settle all three cases? A. That is correct."

Walter S. Franklin, director and vice-president, testified that he knew that if the payment could be deducted as an expense, the cost to Pennsylvania would be about 15% (p. 629); that if the settlement were made in Delaware, the sum of $15,000,000 was going to cover the Overfield, Weigle and Perrine cases (pp. 630, 631, 632).

Richard D. Wood, a commission merchant in cotton goods and an operator of cotton mills, testified that he was a director of Pennsylvania and that he voted in settlement of the Perrine suit (p. 829); that he relied upon counsel.

Mr. C. Jared Ingersoll, in his affidavit, as well as in his deposition, testified that he finally voted in favor of settlement of the Perrine suit for the sum of $15,000,000 because there was no way of knowing what the outcome of the Perrine suit might be.

Mr. Wolf, counsel for Pennroad, testified at page 1551:

> "Q. That agreement referred to the settlement of three suits, two in Pennsylvania and one in Delaware? A. Yes.

Q. When for the first time did you ever learn from either Mr. Dickinson or Mr. McCracken that they wanted this settlement to take place in the Perrine suit—when for the first time? A. When Senator Hastings and I saw Mr. McCracken and Mr. Dickinson after the Board of Pennroad had authorized the settlement which was on February 15th, 1945. We saw Mr. McCracken and Mr. Dickinson a day or a couple of days after that and then—I am not certain of the day. Anyway, it was after that meeting that we saw them to discuss the settlement and they then told us that they wished a settlement made in the form of a settlement of the Perrine suit" (p. 1553).

At the trial, plaintiffs may establish that the inclusion in the agreement of settlement of a provision releasing the estates of the deceased directors of Pennroad from Pennroad's claim of liability was contrary to the best interests of the Railroad Company. The plaintiffs may show that the defendant directors were not adequately informed and did not adequately consider and discuss all the facts and considerations which were essential to the determination of the question whether or not the settlement agreement should be approved.

The plaintiffs may call witnesses to show the real reasons which led the defendant directors to approve the settlement and the facts which actually guided them in reaching their conclusion.

It should be remembered that there are differences among the statements not only as to slight and unimportant details but differences as to whether or not the Overfield and Weigle suits which had been won were being settled or whether the Perrine suit which had been in an inactive state in the Chancery Court of Delaware for years was the case which was settled.

The avowed purpose of those who sponsored the summary judgment practice was to eliminate needless trials where by affidavits it could be shown beyond possible question that the facts were not actually in dispute.

II

This case presents questions of great importance to public stockholders in large companies whose policies are directed by a few holding blocs of stock and acting in concert, thereby enabling the few to elect the directors of the corporation.

One such question is whether a corporation has an indisputable right to indemnity and restitution from former directors for moneys expended in discharging liabilities brought about by such directors through their acts of misconduct, or gross negligence, or bad faith.

It is a fundamental principle of our jurisprudence that one that has been held legally liable for the wrongful act of another "is entitled to indemnity from the latter". (*Oceanic S. N. Co.* v. *Compania T. E.*, 134 N. Y. 461, 467.) The doctrine is one of ancient origin "ever since Justinian said: 'The maxims of law are these: To live honestly, to hurt no man and to give every man his due', it has been a leading object of jurisprudence to compel wrongdoers to make reparation". (*City Trust etc. Co.* v. *A. N. Brewing Co.*, 174 N. Y. 486, 488.) It is not necessary that a defendant from whom an indemnity is sought owe the plaintiff any special or particular duty to refrain from the commission of the act which caused the liability. "The right to indemnity rests upon the principle that everyone is responsible for the consequences of his own wrong and if another person has been compelled to pay the damages which the wrongdoer should have paid, the latter becomes liable to the former." (*Dunn* v. *Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 217; *Phoenix Bridge Co.* v. *Creem*, 102 A. D. 31, aff'd 185 N. Y. 680.)

The rule is one of universal application. It is not limited to the recovery of the damages suffered by one for the tort of another. The liability, for which indemnification will be enforced, may have resulted from the commission of

a tort, the breach of a contract, the violation of a statute, the avoidance of a fiduciary obligation, or the omission of any other duty imposed by the law.*

"The right to indemnity will be enforced in all cases where the liability is derivative or secondary." (*Fedden* v. *Brooklyn Eastern District Terminal,* 204 A. D. 741.)

It is a commonplace that a corporation is "inanimate and incapable of thought, action or neglect". "It can neither act nor omit to act", except through its directors or officers. It follows that the corporation's right to indemnity from its former directors was and is absolute. (*Iroquois Gas Corp.* v. *International Ry. Co.,* 240 A. D. 432, 433.) The former directors of the Pennroad Corporation who were directors of Pennsylvania occupied a relationship towards Pennsylvania, which, at the least, involves the obligations existing between a principal and his agent, or a master and his servant. (*Hun* v. *Carey,* 82 N. Y. 65, 79.)

The decision in *Fedden* v. *Brooklyn Eastern District Terminal,* 204 A. D. 741, one of the leading authorities in this country, squarely sustains the corporation's absolute right to indemnification and reimbursement from its former directors.

The Federal Rule is in accord:

Kramer v. *Morgan,* 85 F. (2d) 96;
Ohio Valley Bank v. *Greenbaum Sons Bank & Trust Co.,* 11 F. (2d) 87, 91.

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* Tort: *Village of Port Jervis* v. *First National Bank,* 96 N. Y. 550; *Prescott* v. *LeConte,* 83 A. D. 482, aff'd 178 N. Y. 583; *New York Central Ry. Co.* v. *Barnet,* 192 A. D. 784.

Breach of Contract: *Lamb* v. *Norcross Bros. Co.,* 208 N. Y. 427; *Pinney* v. *Geraghty,* 209 A. D. 630; *May* v. *Poluhoff,* 65 Misc. 546.

Statutory Violation: *Liberty Mutual Insurance Co.* v. *Colon & Co.,* 260 N. Y. 305.

Fiduciary Duties: *Castle* v. *Noyes,* 14 N. Y. 332; *Kelly* v. *42nd Street Ry. Co.,* 37 A. D. 500.

Obligations Implied by Law: *Carleton* v. *Lombard Ayres & Co.,* 149 N. Y. 137.

The rule in England is the same:

Studdert v. *Grosvenor* (1886), 33 Ch. Civ. 528.

See also:

Lord & Taylor v. *Yale & Towne Mfg. Co.*, 230 N. Y. 132, 138;
Murphy v. *City of Yonkers*, 213 N. Y. 124, 129.

If an indemnitor fails or refuses to assume the defense of an action when called upon to do so, by the party to whom he is ultimately responsible, "the judgment will bind him to the same way and to the same extent as if he had been made a party to the record". (*Oceanic S. Co.* v. *Compania T. E.*, 144 N. Y. 663, 665.) When the indemnitor is called upon to defend, he possesses a right to appear and control the action and to appeal from the judgment. He is entitled to take any other steps in the action which the nominal defendant could pursue. (*Matter of Culver Contracting Corp.* v. *Humphrey*, 268 N. Y. 26, 41-42.)

"The right to indemnity becomes absolute, with the recovery of a judgment in a court of original jurisdiction. * * *" (*Murphy* v. *City of Yonkers*, 213 N. Y. 124, 127.) That judgment is binding and conclusive upon the indemnitor, even though it be settled without an appeal for less than the amount of the judgment. (*Phoenix Bridge Co.* v. *Creem*, 102 A. D. 354; *Kelly* v. *42nd Street Ry. Co.*, 37 A. D. 500.) In fact, the right to indemnity will be enforced even if the claim be settled before the entry of a judgment by any court. The damage "may be voluntarily paid by the innocent party who is legally liable without waiting for judgment". (*Dunn* v. *Uvalde Asphalt Co.*, 175 N. Y. 214, 218.) In that event the innocent party is required to establish, in seeking the indemnity, the reasonableness of the settlement. In the instant case, the respondents have repeatedly emphasized the reasonablness of Pennsylvania's payment to Pennroad. The liability of the estates of the former directors follows, therefore, as a matter of law.

The liability of the former directors to Pennsylvania is as clear and as unquestionable as though the corporation possessed their promissory notes for that amount. The District Court judgment against Pennsylvania in a sum in excess of $22,000,000 evidenced the liability of the former directors. The present directors were obligated to enforce that liability if the judgment had not been reversed. The corporation herein, through the plaintiffs, charges that the directors violated their duty in failing to enforce its rights. Any proof which establishes the existence of those rights is obviously competent. Consequently, the record of that trial "even though not part of the judgment roll must be considered in determining the scope and effect of the judgment". (*Foster* v. *White & Sons,* 244 A. D. 368, 369, aff'd 270 N. Y. 572.)

That a board of directors may not refuse to compel restitution by one of its own members, or a former director, for the damages inflicted upon the corporation by their fraudulent conduct, has been an unchallenged precept of corporate jurisprudence for generations. The conduct which it demands lies beyond the bounds of any discretion permitted to corporate directors. Claims of discretion, policy, expediency, or any of the thousand and one excuses which may be devised by an ingenious mind to justify a violation of its mandate will not avail. Directors *must* compel restitution by a present or former director, for the losses occasioned by his fraudulent conduct. A faithless trustee *must* account. Restitution *must* be enforced. If the directors refuse to enforce that duty, they will be equally liable to the corporation in a suit by a minority stockholder. Time and again the Courts have been "petitioned to undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions". (*Meinhard* v. *Salmon,* 249 N. Y. 458, 464.) The standard has never been lowered by a judgment of any Court. The directors' destruction of that "corporate asset" by their refusal to enforce the claim constitutes an illegal and unauthorized misappropriation of corporate property for which they

must all respond. Their conduct in so doing may not even be ratified by a majority of the stockholders. The direct or indirect misappropriation of assets of the corporation to their own use or benefit by an officer is incapable of being authorized or ratified by a vote or any act or omission by a majority of the stockholders. (*Pollitz* v. *Wabash R. R. Co.*, 207 N. Y. 113, 127.)

In *Matter of Auditore*, 249 N. Y. 335, the Court of Appeals reaffirmed the doctrine that fiduciaries must compel restitution by a delinquent trustee. In that case, Crane, J., referred in the following language, to a director's obligation when he is confronted with a misappropriation of corporate funds.

> "The corporation could have sued or upon its failure or refusal so to do, the administrator representing the stock could have brought the action. Would he have been guilty of negligence and carelessness in failing to compel the corporation to bring the action or in bringing the action himself if he knew by so doing the money could be restored to the corporation? To put this proposition I think is to answer it."

See also:

Quintal v. *Kellner*, 264 N. Y. 32;
General Rubber Co. v. *Benedict*, 215 N. Y. 18;
Gilbert v. *Finch*, 173 N. Y. 455;
Harris v. *Pearsoll*, 116 Misc. 366.

A decision squarely in point, the facts of which are indistinguishable from those of the instant case, is *Hill* v. *Murphy*, 212 Mass. 1. There the directors of a corporation published a libel concerning one Hill, in connection with his acts as an officer of the corporation. Hill sued the corporation and obtained a judgment for a substantial amount. The corporation paid that judgment out of its treasury. Hill, as a stockholder of the corporation, then demanded that the guilty directors reimburse the corporation for

the amount so paid. That they refused to do. He thereupon commenced a minority stockholder's action to compel them to do so. In sustaining the sufficiency of the complaint, the Court said, page 2:

> "The liability of the directors is not limited to cases where the loss to the corporation results from fraudulent misconduct on their part or where they have received financial profit which in equity belongs to the company (citing cases) and the familiar decisions of non-liability of directors acting honestly and within their power for losses sustained by the corporation through their negligence, do not apply."

In *Eshleman* v. *Keenan,* 187 Atl. 25 (Delaware Chancery, 1936), a minority stockholder suing on behalf of the Sanitary Company of America claimed that two directors had been paid twice for identical services. *The board of directors refused to sue those directors Keenan and Brewer to recover those monies.* On those facts the Court allowed a recovery for the plaintiff and said:

> " * * * The bill charges a fraud and the evidence sustains it. Now, where that is the case, it is not in the power of a majority of the stockholders to deprive the minority of their right to insist upon a rectification. This case is quite clearly distinguishable from Karasick v. Pacific Eastern Corp., 180 A. D. 604, 605, tried by this Court last August. In that case the question was one of the compromise of a disputed claim and whether the sum that was offered in settlement was reasonable, in view of the likelihood first of the recovery of judgment and, second, of the amount ultimately collectible thereon if the judgment were obtained. The proposed supplemental answer presents no authorization by the stockholders of a compromise as in the Karasick case. As it is aptly put by the solicitor for the complainants, it presents a surrender. The majority proposes to give away what, as will hereinafter appear, is a perfectly good asset, in the form of a claim belonging to the corporation without a single thing by way of compensation in return.

> Can that be done? I can find no authority justifying it. There is a wide field in which the discretion of stockholders is allowed free exercise. * * * But this field of discretion does not extend so far as to permit the majority against the dissent of the minority to grant full pardon and absolution to those who have perpetrated a fraud upon the corporation.
>
> Obviously, whether the Board of Directors refuses to compel the delinquent fiduciaries restitution by its decision not to sue, or by its execution of a release, the consequence is exactly the same. In each instance, the Courts have unanimously ruled that the directors' conduct is illegal and will be nullified in a suit by a stockholder.
>
> The directors of a corporation are all liable for any diversion of corporate funds where they assent to the fiduciaries' derelection and purport to authorize it. 'All the defendants are responsible' * * * for it was part of the fraudulent confederation into which they all entered." (*Bosworth* v. *Allen,* 168 N. Y. 157, 168.)
>
> "A director would be bound to restore what he had taken or permitted others to take." (*General Rubber Co.* v. *Benedict,* 215 N. Y. 18, 25.)
>
> "One who cooperates with a fiduciary in his breach of duty becomes liable in every way as the fiduciary with whom he cooperates." (*Lonsdale* v. *Speyer,* 248 A. D. 133, 141.)

In *Malmud* v. *Blockman,* 251 A. D. 192 (2nd Dept.), the Court said, page 194, in discussion of the nature of the action in that case:

> "Its purpose is to compel restitution of the loss sustained by the illegal conduct of the trustee and the borrowers, whereby the trust estate has been spoiled. Everyone actively concerned in such a transaction must answer for the loss to the trust estate." (*Irving Trust Co.* v. *Deutsch,* 73 Fed. (2d) 121; certiorari denied, 204 U. S. 709.)

III

The decision of the Court below presents an important question of appellate procedure.

The decision of the Circuit Court of Appeals in the case of Overfield-Weigle v. Pennsylvania Railroad Company reversed the judgment of the District Court and directed the District Court to enter a judgment dismissing the complaint. The Circuit Court of Appeals granted extension to the plaintiff to petition the Court for a reargument over a period of seventeen months. Such extensions, as a matter of law, were unreasonable as going beyond the term of the Court. Had these extensions not been granted by the Circuit Court of Appeals the parties would have been unable to enter into the agreement of settlement because there would have been no consideration for the payment of $15,000,000 by the Pennsylvania Railroad Company to the Pennroad Corporation—the consideration being the consent of the Pennroad Corporation to permit the mandate of the Circuit Court of Appeals to be made the judgment of the District Court dismissing the action.

The Federal rules applicable to appellate practice do not contemplate that the time be enlarged to an extent beyond the term of the Court within which to apply for a reargument. This decision of the Circuit Court of Appeals, affirming the District Court, in view of the questions involved, approves such practice and it is for the Supreme Court to say whether such practice should be permitted.

IV

The decision of the Court below presents the important question as to whether or not the acts of the parties are against public policy.

The parties had entered into an agreement whereby the Pennsylvania Railroad Company agreed to pay to the Pennroad Corporation the sum of $15,000,000 in settlement of all claims of the Pennroad as against the Pennsylvania. This settlement would release the defendants in the Overfield-Weigle actions from any claims by the Pennroad Corporation or its stockholders. The parties did not endeavor to make a settlement pursuant to the rules of the Federal Court with respect to stockholders' suits but evaded those rules and agreed to have Judge Welsh, a Federal District Judge sitting not in the capacity of a Federal Judge, guided and limited by the rules of the Federal Court, but acting in a private capacity as arbitrator, and, in such capacity as arbitrator, to determine fees to be paid to the attorneys for the plaintiffs, the losing parties, to the extent of $3,000,000.

This question has, insofar as counsel can ascertain, never been decided by the United States Supreme Court. An analogous situation, however, may be found in the Constitution of the State of New York, which prohibits a judge from sitting as an arbitrator for compensation or otherwise. This provision of the New York State Constitution and the cases decided thereunder were predicated upon the fact that it would be against public policy to permit a judge to sit as an arbitrator. So, too, to permit a Federal Judge to sit as an arbitrator in a case wherein he has the power to fix fees to an extent up to $3,000,000, without being limited or guided by rules of law, is against public policy and would tend to discredit the judiciary because it is plain, upon the face, that the parties were attempting to accomplish outside the pale of law what they could not accomplish within the rules of law.

Plainly stated, Senator Hastings and his colleagues, who represented the plaintiff in the Overfield-Weigle suit, which was dismissed by the decision of the Circuit Court of Appeals, without doing any more work, have succeeded in setting aside a fund of $3,000,000 for the payment of their counsel fees to be fixed by a Federal Judge sitting as an arbitrator, where he is not bound by any of the rules of the Federal Court.

The decision of the Circuit Court in the case at bar, affirming that of the District Court, puts the stamp of approval upon the procedure whereby a District Judge is permitted to sit as an arbitrator to fix fees for the attorneys for the losing parties to an extent not to exceed the sum of $3,000,000. This is a question which presents itself and should be reviewed by the Supreme Court of the United States and upon such review it should be determined that a Federal Judge should not be permitted to sit as an arbitrator in a proceeding outside the scope of his judicial duties.

The amount set aside for fees is so substantial and affects so large a number of stockholders, and of such general interest, that the Court of competent jurisdiction should not be deprived of its right to pass upon the same. In the circumstances of this case such a result would be a serious reproach to the judicial machinery of the Federal Court. The method adopted to fix the fees was the appointment of an arbitrator, unguided by rules of law or the rules of federal procedure, where there is no right to review and no right of appeal. The stockholders, although they may be heard in connection with the fixing of fees, cannot object or protest to the amount an arbitrator chooses to fix, up to an amount of $3,000,000. The fixing of such fees, not by the stockholders, not by the Court, nor through any judicial proceeding, but by an agreement between the Pennsylvania Railroad Company and the Pennroad Corporation, should not be countenanced.

The decision of the Circuit Court of Appeals affirming the judgment of the District Court dismissing the complaint

puts a stamp of approval upon the right of these parties to deprive the stockholders of these corporations to be heard in connection with fees to the extent of $3,000,000, or to appeal from a decision fixing such fees.

Conclusion

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the order of the Court below.

Respectfully submitted,

ARCHIBALD PALMER,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 435 1

ANNA C. DICKHEISER and EDWARD S. BIRN, on their own behalf and on behalf of all other stockholders of THE PENNSYLVANIA RAILROAD COMPANY, one of the defendants herein,

Petitioners,

against

THE PENNSYLVANIA RAILROAD COMPANY, a corporation of the Commonwealth of Pennsylvania; M. W. CLEMENT, C. JARED INGERSOLL, ARTHUR C. DORRANCE, THOMAS S. GATES, RICHARD K. MELLON, LEONARD T. BEALE, PIERRE S. duPONT, D. R. McLENNAN, FRANKLIN D'OLIER, ROBERT T. McCRACKEN, THOMAS NEWHALL, JAMES E. GOWEN, RICHARD D. WOOD, J. F. DEASY, WALTER S. FRANKLIN, J. R. DOWNES, GEORGE H. PABST, JR., THE PENNROAD CORPORATION, IONE M. OVERFIELD, GRACE STEIN WEIGLE,

Respondents.

BRIEF OF RESPONDENTS THE PENNSYLVANIA RAILROAD COMPANY, M. W. CLEMENT, C. JARED INGERSOLL, ARTHUR C. DORRANCE, THOMAS S. GATES, LEONARD T. BEALE, ROBERT T. McCRACKEN, THOMAS NEWHALL, JAMES E. GOWEN, RICHARD D. WOOD, J. F. DEASY, WALTER S. FRANKLIN, J. R. DOWNES AND GEORGE H. PABST, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN DICKINSON,
JOHN B. PRIZER,
1740 BROAD ST. STATION BLDG.,
PHILADELPHIA, PA.
Counsel for above named respondents.

SEPTEMBER 23, 1946.

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IN THE

Supreme Court of the United States

No. .

Anna C. Dickheiser and Edward S. Birn, on their own behalf and on behalf of all other stockholders of The Pennsylvania Railroad Company, one of the defendants herein.

Petitioners,

against

The Pennsylvania Railroad Company, a corporation of the Commonwealth of Pennsylvania; M. W. Clement, C. Jared Ingersoll, Arthur C. Dorrance, Thomas S. Gates, Richard K. Mellon, Leonard T. Beale, Pierre S. duPont, D. R. McLennan, Franklin D'Olier, Robert T. McCracken, Thomas Newhall, James E. Gowen, Richard D. Wood, J. F. Deasy, Walter S. Franklin, J. R. Downes, George H. Pabst, Jr., The Pennroad Corporation, Ione M. Overfield, Grace Stein Weigle,

Respondents.

BRIEF OF RESPONDENTS THE PENNSYLVANIA RAILROAD COMPANY, M. W. CLEMENT, C. JARED INGERSOLL, ARTHUR C. DORRANCE, THOMAS S. GATES, LEONARD T. BEALE, ROBERT T. McCRACKEN, THOMAS NEWHALL, JAMES E. GOWEN, RICHARD D. WOOD, J. F. DEASY, WALTER S. FRANKLIN, J. R. DOWNES AND GEORGE H. PABST, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court of the United States for the Eastern District of Pennsylvania herein is reported in 5 F. R. D. 5 (October 11, 1945). The opinion of the Circuit Court of Appeals for the Third Circuit herein (filed May 27, 1946) is reported in 155 F. (2d) at p. 266.

JURISDICTION.

The jurisdiction of this Court has been invoked by petitioners under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C. 347(a)).

COUNTER STATEMENT OF THE CASE.

(*a*) NATURE OF THE CASE.

The ultimate question presented by the complaint in the present case is, whether or not an agreement of settlement which disposes of certain litigation against The Pennsylvania Railroad Company was an appropriate one for the directors of that Company to approve, in the exercise of their judgment and discretion as such directors. The complaint, which is filed by two stockholders alleging that they are the owners of 120 shares of the stock of The Pennsylvania Railroad Company, seeks an injunction against the directors to prevent the carrying out of the agreement of settlement, or, in the alternative, damages if the agreement of settlement should be carried out. On this ultimate question, the courts below, applying well-settled common-law tort principles of the law of Pennsylvania—which in this case is admittedly the applicable law—held that the agreement of settlement was a proper exercise of the directors' discretion, and dismissed the complaint.

(*b*) CONTENTS OF RECORD BELOW.

These respondents filed an answer to the complaint, in which it was pointed out that the litigation disposed of by the agreement of settlement, which had been pending in the courts for many years and had gone through numerous protracted proceedings, presented a possible danger of liability on the part of the Railroad Company to the extent of many millions of dollars, that counsel for the Railroad Company could give no assurance as to the successful outcome of that litigation, and that in view of all the circumstances the directors had concluded that it would be to the best interests of the Railroad Company to dispose of this source of harassment and the danger of burdensome liability which it presented, by means of the settlement agreement.

Following the filing of that answer, counsel for petitioners herein, purporting to proceed under Rule 56 of the Federal Rules of Civil Procedure, served notice for taking the depositions of most of the respondent directors and of other persons. As a result of this procedure, petitioners' counsel, during five full days of taking depositions, obtained, by unlimited cross-examination, the statements of twelve of the directors of the Railroad Company, these being all the directors of the Railroad Company who were available for that purpose and, with two exceptions, all the directors who participated in the approval of the settlement agreement. Petitioners' counsel also obtained the depositions of numerous other persons who were in one way or another involved in or concerned with the settlement agreement and the negotiations leading up to it. All these depositions were before the District Court, in the form of affidavits in support of a motion by these respondents for summary judgment in their favor. In addition, there were before that court the affidavits of the two remaining directors of the Railroad Company, who participated in the approval of the settlement agreement but were not available for the

taking of depositions, reciting in full their participation and their reasons for approving the settlement. The District Court thus had before it the statement of every one of the directors of the Railroad Company, with the exception only of one director, who had died before the settlement in question was proposed, and two other directors who, because of participation in the affairs of the United States Government, were absent from the directors' meetings which considered the proposed settlement and in no way participated in the consideration or approval of it. Also before the District Court were the statements, obtained in the same way, viz., by petitioners' counsel on cross-examination, of every other person who had any substantial part in the negotiations leading up to the settlement.

When confronted by the affidavits of all the directors concerned, embodying the depositions taken by petitioners' counsel, and filed under the summary judgment rule, petitioners, although given full opportunity to present counter-affidavits, as contemplated by the rule, presented only an affidavit by their counsel, setting forth not facts but legal arguments allegedly in support of their position. No affidavit of facts in contradiction of the facts testified to by the directors in their depositions was offered by petitioners.

Thus, the basis upon which the District Court reached its determination included the statements of all persons who were in a position to know and explain the various factors which led to the settlement agreement and which caused the directors of the company to approve that agreement. These statements contained full and repeated explanations and discussion of what these factors were and what was in the minds of the directors of the Railroad Company when they determined that it would be desirable, from the standpoint of the Railroad Company, to approve the settlement agreement. With the exception of the statements of the two directors above referred to, who were not available for depositions, these statements

were all elicited on cross-examination by petitioners' counsel, and furthermore they were not contradicted by any counter-affidavit of facts on petitioners' side. These statements therefore must be taken to present all that petitioners would be able to bring out on the trial of the case. No genuine issue of material fact appears from these statements, and all the materials for a complete decision of the ultimate question on the merits were before the District Court.

(*c*) Action of Courts Below.

On the basis of the record thus made before it, the District Court concluded that there was no genuine issue as to any material fact and that the case was appropriate for application of the summary judgment rule. It found, upon analysis, that petitioners' arguments rested not on any factual evidence of a breach of duty by these respondents but on certain legal contentions and assumptions as to the effect to be given in one suit to the decision of another suit and other legal assumptions. In the language of Judge Bard, for the District Court (5 F. R. D. 10):

> "These legal assumptions, which find no support in the law, form the core of complainants' charge that the directors of Pennsylvania are giving away $15,000,000 of Pennsylvania's assets to settle litigation in which the corporation allegedly finds itself victorious. If these fallacious legal conclusions, which were alleged as facts in the complaint, are discarded, as they must be, the allegation of fraud and neglect of duty is stripped of its factual support."

Since petitioners' case thus rested not upon a bona fide showing of facts but upon legal contentions stated as though they were facts, it was entirely clear that there was no genuine issue of material fact and that the summary judgment rule was properly applicable. Applying that rule, the District Court concluded that the allegations

in the complaint of fraud and neglect of duty on the part of the directors were wholly unsupported. As stated by Judge Bard (5 F. R. D. 10):

> "Complainants' bare allegation of fraud and neglect of duty, without allegation of cognizable facts which constitute the fraud and neglect of duty, is insufficient to create a cause of action. Aetna Casualty & Surety Co. *v.* Abbott, 4th Cir., 130 F. (2d) 40; Hirshhorn *v.* Mine Safety Appliances Co., D. C. Pa., 54 F. Supp. 588; United States *v.* Hartmann, D. C. Pa., 2 F. R. D. 477; Lopata *v.* Handler, D. C. Okl. 37 F. Supp. 871, appeal dismissed 10 Cir., 121 F. (2d) 938."

The District Court went further and found that the petitioners' charges of fraud and neglect of duty were not only unsupported but were affirmatively disproved by the statements which these respondents had submitted to the court. The court, after reviewing the various factors which led the directors to approve the settlement agreement, stated its conviction that "from the affidavits it is apparent that these factors were fully discussed at the Board meetings and they sufficiently indicate that the directors, in approving the settlement, were acting in good faith for what they thought was the best interest of the railroad" (5 F. R. D. 10).

Accordingly, a summary judgment for the respondents was entered. On appeal to the Circuit Court of Appeals, this judgment was affirmed, in a *per curiam* opinion which adopted the opinion of the District Court (155 F. (2d) 266).

(*d*) Petitioners' Violation of this Court's Rule 38.

Contrary to the requirements of paragraph 1 of Rule 38 of this Court, petitioners have not filed with this Court any transcript, either certified or uncertified, of the record in this case. They have filed with their petition a document entitled "Appendix to Brief of Complainants-

Appellants", in which they have printed a very small portion of the voluminous record which was before the District Court. It is submitted that petitioners, upon whom rests the burden of persuading this Court to issue its writ of certiorari, have failed in a materially important respect to meet that burden by their failure to file with this Court a complete transcript of the record, and that this failure alone should constitute a sufficient ground for a dismissal of the petition (*Bailey* v. *Arizona ex rel. Murphy*, 275 U. S. 575, 48 S. Ct. 31 (1927)). Without a complete transcript of the record before it, this Court has no proper basis upon which to found the conclusion that the action of the courts below should be reviewed, and the petitioners, by their failure to supply the Court with such a basis, cannot throw upon respondents the affirmative duty of providing a basis for the conclusion that the action of the courts below should not be reviewed.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

Whether an appropriate occasion is presented for this Court to issue its writ of certiorari and review the decisions of the lower courts in a proceeding where it appears that:

(*a*) The ultimate question at issue is whether or not the action of the directors of a corporation in authorizing the settlement of the litigation met the standard of care imposed by the law of Pennsylvania, and both lower courts held that it did;

(*b*) On a record which included the statements, elicited upon cross-examination by petitioners' counsel, of all the corporate directors and others involved in the making of the settlement agreement, both lower courts held that there was no disputed issue of material fact and that a summary judgment should be granted in favor of the respondents.

ARGUMENT.

This suit presents no occasion for the issuance of a writ of certiorari. No questions of important public policy are involved. The suit turns not upon any question of interpretation of the Federal Constitution or of any Federal Statute, but merely upon the application of principles of local tort law to uncontradicted and undisputed facts. The applicable local law is that of Pennsylvania, and there is no dispute with regard to the applicability of that law. The judges of the District Court and the Circuit Court of Appeals, trained in Pennsylvania law and sitting in Pennsylvania, have concluded that the undisputed facts of the case do not, under Pennsylvania law, provide any basis for liability and have accordingly dismissed the complaint. There is no reason for this court to issue its writ of certiorari for the purpose of reviewing that decision.

Petitioners raise the question as to whether or not the courts below acted properly in holding the summary judgment rule applicable. But a brief examination of the case will make it plain that, since there is no dispute as to the material facts and the only questions before the courts below were legal ones, and since all the materials necessary for a decision on those questions were before the courts below, the case is a wholly appropriate one for the application of the summary judgment rule.

I. The District Court and The Circuit Court of Appeals Did Not Err in Concluding that Respondents' Motion for Summary Judgment Could Properly be Granted on the Record Made in the District Court.

This case was before the District Court and the Circuit Court of Appeals on the motion of these respondents for a summary judgment in their favor, based on the affidavits filed in support of the motion, to which were attached all the depositions taken at the instance of peti-

tioners' counsel, and on the pleadings and other papers before the District Court.

Rule 56 of the Federal Rules of Civil Procedure provides that a party against whom a claim is asserted may at any time "move with or without supporting affidavits for a summary judgment in his favor." The rule accords the adverse party an opportunity to file opposing affidavits, and then goes on to state that "the judgment sought shall be rendered forthwith if the pleadings, depositions, admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

This language plainly indicates that, when a motion for summary judgment has been made by one party, with supporting affidavits, and when opportunity has been given the adverse party to file opposing counter-affidavits, it is then the duty of the court to examine the pleadings, affidavits and counter-affidavits, and any other papers before the court, in order to determine whether or not the various factual statements made by the respective parties show that there is any genuine issue as to any fact which is material in the light of the issues of law framed by the pleadings. If from such examination the court should conclude that there is no real dispute between the parties as to what actually occurred, and therefore no genuine issue of fact, or that such issues of fact as there may be are not material, and that the questions presented for the court's decision, on the basis of the papers before it, are questions of law or of the application of the law to the substantially undisputed facts, then the court must render the judgment sought if it is satisfied that the moving party is entitled thereto on the legal issues.

A. All the Materials Necessary to a Decision Were Present in the Record Before the Courts Below.

The question before the courts below in this case was simply whether or not the directors of The Pennsylvania Railroad Company were acting within the legitimate limits of their discretion as directors in approving an agreement of settlement. In determining that question, the factors which are relevant and important for the court to consider are the provisions of the agreement and the reasons which led the directors to approve it. All of that information is in the record which was before the District Court on the respondents' motion and before the Circuit Court of Appeals on appeal. The agreement itself appeared as Exhibit D attached to the answer of the respondents, and is also set forth in the corporate minutes which are in the record. The reasons which led the directors to approve the agreement, the consideration and discussion which they gave to the matter, and the advice of counsel upon which they relied, all appear from the statements of the directors themselves, which are in the record. As already pointed out, the statements which were before the court included the statement, under oath, of every director of the Railroad Company who participated in the consideration of the agreement, and of every other person who had any substantial part in the negotiations leading up to the agreement. All these statements represented the testimony of the directors and other persons involved, given in response to unlimited cross-examination by counsel for petitioners, with the exception only of the statements of two directors who were unavailable at the time the depositions were taken by petitioners' counsel, and whose affidavits under oath were subsequently supplied.

Despite the opportunity given the petitioners, in accordance with the summary judgment rule, to present counter-statements of fact, petitioners failed to controvert any material fact set forth in the respondents' affidavits

and depositions and failed to add any material facts. No counter-affidavit of facts was filed at all by petitioners, and the only affidavits in this case filed in their behalf were affidavits of their counsel, which affidavits contained only legal arguments and did not contain any statement of facts in contradiction of or in addition to the material facts set forth in respondents' affidavits.

B. THERE IS NO GENUINE DISPUTE AS TO ANY MATERIAL FACT IN THIS CASE, AND THE CONTROVERSY TURNS WHOLLY UPON LEGAL QUESTIONS.

Thus, petitioners have not controverted any of the material facts. As already stated, the facts which are material are those with respect to the terms of the agreement itself and with respect to the reasons which the directors had in mind in approving it. The terms of the agreement speak for themselves. Moreover, there can be no dispute on this record as to what was in the minds of the directors in approving the settlement, since the directors themselves have stated what they had in mind and what the factors were which guided them in reaching their conclusion. Petitioners have attempted to build up an alleged dispute as to material facts out of minor differences with respect to wholly immaterial matters. Thus, it has been suggested that there is a dispute in the record as to who first spoke to whom in opening the negotiations which culminated in the agreement, and exactly what words were used in those initial conversations. But these are totally unimportant questions and are entirely irrelevant to the fundamental question in the case, viz., whether or not the settlement agreement was a proper one for the directors to approve. With regard to that question, the important and controlling factors are the provisions of the agreement itself, and the reasons which led the directors to approve it.

Those factors have been fully laid before the courts

below, in the agreement itself and the statements of the directors obtained through the extended and unlimited cross-examination which has been allowed to petitioners' counsel. These statements disclose no dispute as to the grounds which the directors had in mind in approving the agreement or as to any material fact affecting the reasonableness or propriety of those grounds; and petitioners, although given full opportunity, in accordance with the rule, to contradict these facts by counter-affidavits, have not done so, but have merely filed legal arguments in the form of affidavits by counsel. There is accordingly no genuine dispute as to any material fact on the record in this case.

C. Petitioners Confuse the Question as to Whether or not There is a Genuine Issue of Material Fact with the Question as to Whether or Not the Undisputed Facts Sum Up into a Particular Legal Conclusion.

Petitioners insist that the summary judgment rule is not applicable here because there are issues in dispute. But, as already shown, the material facts are not contradicted and there is no dispute as to them. The only dispute in the courts below was as to the legal effect of those facts, *i. e.*, what were their legal consequences. Those are plainly questions for the court, which may properly be decided under the summary judgment procedure. Petitioners are attempting to distort those issues into alleged issues of fact, in order to defeat the summary judgment rule and have the case sent back for a trial. But petitioners' mere allegation that the issues involved are issues of fact does not alter their nature or convert them from what they really are, viz., issues as to the conclusions to be drawn from the facts and the legal consequences thereof. As the District Court put it, "a close study of the pleadings and the voluminous supporting affidavits reveals no genuine issue of material fact"; and further, the petitioners' "purported issues of fact are, in reality, questions of law or ultimate conclusions of subjective facts

to be deduced by the Court from facts which are not disputed" (5 F. R. D. 9).

Petitioners' whole case, according to the District Court, is "based on an erroneous interpretation of the legal effect of the Circuit Court decision in the Overfield-Weigle case" (5 F. R. D. 10). That their case turns on this legal question has now been conceded by the petitioners themselves. In their petition for certiorari (page 9) they describe their own case as follows:

> "The essence of plaintiffs' contention in this complaint is that the decision of the court below (the Circuit Court of Appeals) in the Overfield-Weigle suits is determinative of the Perrine suit in the Delaware State courts and bars liability in that suit, and that therefore there was no reasonable basis for settlement of the Perrine suit."

In other words, petitioners' entire case lies in their contention that the decision of the Circuit Court of Appeals in one set of cases, to the effect that recovery in those cases is barred by the statute of limitations, is *res adjudicata* and therefore determinative of a wholly separate case pending in another court in a different jurisdiction. This question, and the propriety of the position which the respondent-directors took with respect to it, are purely legal questions, which may accordingly be decided by the court upon a motion for summary judgment. Of course, the determination of these questions necessarily involves the knowledge of certain facts—*e. g.*, in which courts the various cases are pending, what has happened in those courts, the similarities and differences between the suits involved, etc. Most of these are matters which are set forth in the pertinent court opinions and of which the courts below could therefore properly take judicial notice. But in any event, there was no dispute whatever in this record as to any of these essential facts. The only dispute was as to the ultimate legal conclusions to be drawn from them.

D. THE SUMMARY JUDGMENT RULE WAS PROPERLY HELD TO BE APPLICABLE.

The situation thus presented in the record before the courts below brings the case squarely within the governing principles applicable under the summary judgment rule. These principles have been clearly and succinctly set forth by Mr. Justice Rutledge, while sitting on the Court of Appeals for the District of Columbia, in *Fox* v. *Johnson and Wimsatt,* 127 F. (2d) 729 (1942). In that case it was held by that Court that summary judgment was properly granted for the defendant therein on the basis of the affidavits and other papers before the Court, and Mr. Justice Rutledge, speaking for the Court, said (pages 736-37):

> "There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them respecting intention. But there was none as to the facts themselves. In other words, *the evidentiary facts were not substantially in dispute.* * * * *Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court.* The court had before it all the facts which formal trial would have produced. *Going through the motions of trial would have been futile.* Judgment therefore was properly given for the defendant." (Emphasis supplied.)

That language is exactly applicable here. With the full statements of all the directors of the railroad company, elicited upon practically unlimited cross-examination by petitioners' counsel, before the District Court, together with the statements of numerous other persons concerned in one way or another in the matter, that court, as well as the Circuit Court of Appeals, had all the essential and relevant "evidentiary" facts which a formal trial would produce, and going through the motions of such a

trial would have been futile. As Mr. Justice Rutledge indicated, in the language just quoted, the rule is applicable where, as here, there is no real dispute as to the material facts; and the application of the rule is not prevented by the fact that there may be a conflict among the parties concerning the proper interpretation placed upon the facts and the ultimate inferences and conclusions to be drawn from them, so long as there is no real dispute as to any material phase of what actually occurred. In the present case there is no dispute as to any material phase of what has actually happened.

One very important case which serves to answer petitioners' position on the summary judgment rule—but which petitioners themselves, strangely enough, cite as being in support of their position—is *Associated Press* v. *United States,* 326 U. S. 1, 65 S. Ct. 1416 (1945). In that case this Court and the lower courts were confronted with an anti-trust suit in which a highly complicated factual situation was presented. This Court nevertheless held that the complexities in the facts of the case and the vigorous dispute between the parties as to the conclusions to be drawn from them and the ultimate legal result to be reached did not constitute an impediment to the application of the summary judgment rule, and concluded that that rule was applicable. Here the factual situation is much less complex, and, since the only controversy is as to the conclusions to be drawn from the facts and the legal result to be reached, the summary judgment rule is likewise applicable.

Of the many other cases in which the summary judgment rule has been held applicable in similar situations, the following may be cited as appropriate examples: *Toebelman* v. *Missouri-Kansas Pipe Line Co.,* 130 F. (2d) 1016 (C. C. A. 3rd, 1942); *Engl* v. *Aetna Life Insurance Co.,* 139 F. (2d) 469 (C. C. A. 2d, 1943); *Lopata* v. *Handler,* 37 F. Supp. 871 (E. D. Okla., 1941).

Petitioners in arguing against the applicability of the summary judgment rule cite a number of cases (pages 13-

14 of the petition) in which the applicability of that rule was at issue. But none of these cases is authority against the application of the rule here, as an examination of them will show.

In *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620, 64 S. Ct. 724 (1944), the entire controversy turned on questions of valuation of natural gas, and this Court held that it was improper for the trial court to base its findings as to values on the affidavits of experts which were controverted in the record. Similarly, in *Arnstein* v. *Porter*, 154 F. (2d) 464 (C. C. A. 2d, 1946), on which petitioners appear to place their chief reliance, the plaintiff charged infringement of copyrights and demanded a jury trial, and, upon affidavits and depositions filed under the summary judgment procedure, the controversy resolved itself into allegations on the plaintiff's side of copying by defendant of plaintiff's musical compositions and categorical denials on defendant's side that he had ever seen or heard any of plaintiff's compositions. These allegations and denials presented a clear issue of disputed material facts, and the application of the summary judgment rule under those circumstances deprived the plaintiff of his right to trial by jury. The court therefore held quite properly that the summary judgment rule should not have been applied.

It may be noted that in both of those cases it appeared that the application of the summary judgment rule deprived the plaintiff of his right to a trial by jury. In the present case no such situation is presented. Even if the summary judgment rule were held to be not applicable and the case were returned for trial, the trial would be held before a District Judge sitting in equity without a jury inasmuch as the suit is for an injunction.*

* While it is true that the complaint in the present case also asks for damages in the alternative, the fact is that the act which is complained of—viz., the carrying out of the settlement agreement—has not yet happened, and petitioners could not possibly show damages until that has happened. Therefore, the only remedy which petitioners could properly claim at the present time would be that of an injunction, which would of course require an equity trial.

But the District Judge has already had before him the statements of all the persons who would be called to testify in such a trial, and has thus had full opportunity to determine from those statements whether or not a trial was needed. This is plainly a different situation from one in which the application of the summary judgment rule acts to deprive a litigant of the trial by jury to which he otherwise would be entitled and to compel him to have his case determined solely by the trial judge.

In *Doehler Metal Furniture Co. Inc.* v. *United States,* 149 F. (2d), 130, (C. C. A. 2d, 1945), another case cited by petitioners, a suit for damages for breach of contract was determined by means of the summary judgment rule, and the determination included a fixation of damages. Certain material questions of fact existed with respect to the fixation of the damages, and the court appropriately held that those questions should have been tried out. In *Arenas* v. *United States,* 322 U. S. 419, 64 S. Ct. 1090 (1944), the suit involved the determination of the rights of an Indian to certain land allegedly allotted to him under the statutory procedure providing for such allotment, and this Court concluded that the government's legal arguments were inadequate, as a matter of law, to establish the absence of legal right to the land in the petitioning Indian, and therefore reversed the summary judgment which had been entered at the government's request and sent the case back for trial, since the petitioner had not moved for summary judgment against the government. Thus the reversal of the lower court's decision in that case turned wholly upon the substantive questions of law which were presented, and not upon the appropriateness of the case for application of the summary judgment rule. In *Associated Press* v. *United States,* 326 U. S. 1, 65 S. Ct. 1416 (1945), as already pointed out above, the application of the summary judgment rule upon a bill for injunction brought under the Sherman Anti-trust Act was approved by this Court. Likewise, in *Toebelman* v. *Missouri Kansas Pipe Line Co.,* 130 F. (2d)

1016 (C. C. A. 3rd, 1942), referred to above as supporting respondents' position, the application of the summary judgment rule to a stockholder's derivative suit seeking an accounting for allegedly wrongful acts by the corporation directors was approved with respect to certain of the causes of action alleged, and was disapproved only with respect to one, as to which the Court found that an independent investigation of a certain account was necessary in order to determine questions as to certain amounts of money in issue, and as to which summary judgment was therefore clearly improper because of the dispute as to material facts.

Thus, it is clear that none of the cases cited by petitioners in which the summary judgment procedure under the Federal Rules of Civil Procedure was involved has any applicability to the present case. In each of the cases cited in which the summary judgment rule was held not applicable, the court (with the exception of the *Arenas* case, where the defense was held inadequate on the questions of law involved) quite properly found that there were disputed issues as to material facts, and it also appeared in those cases that the application of the summary judgment rule resulted in a denial to one of the litigants of his right to a trial by jury on those disputed issues of fact. As already indicated, there are no disputed issues of material fact in the present case, but only disputes as to legal conclusions to be drawn from the uncontroverted facts, and petitioners are in no way being deprived of any right to trial by jury.

Before leaving this discussion of the applicability of the summary judgment rule to the present case and petitioners' argument with respect thereto, brief reference should be made to two different and clearly untenable assumptions on which petitioners' argument in this respect appears to be based.

One of these erroneous assumptions is that, whenever negligence or bad faith is charged, there must be a trial

(see discussion at page 15 of petition). But there is plainly no foundation, either in the summary judgment rule, or in its history or in the decisions under it, for assuming such a generic exception to its range of application. The discussion of this rule, in the Proceedings of the Institute on the Federal Rules of Civil Procedure, made it plain that the rule was intended to apply to any kind of case, including tort actions as well as other types of action. The member of the Advisory Committee charged with the explanation of Rule 56 made the following statements on this very point:

New York proceedings (p. 265 of Washington and New York Proceedings of the Institute on the Federal Rules of Civil Procedure):

> "*Under the federal Rule, a summary judgment is available in any kind of case.* It was first authorized in England for liquidated claims for money only, and was employed exclusively as a procedure for collecting debts. It was later extended to actions for possession of land or chattels. Now it embraces all actions with the exception of six or eight types specially enumerated. *Under the federal rules it extends to every possible action,* and also to a demand for declaratory judgment. * * * The New York Rule covers unliquidated claims arising on contracts, but it does not cover unliquidated claims arising out of tort; *whereas the federal rule applies to tort actions as well as any other type of action.* Under the New York practice the defendant may use this remedy not only in the eight types but in any type of action if his defense is founded on documentary evidence, but otherwise he can use it only in the eight kinds of action enumerated in the rule. *The federal rule makes no such distinction and the remedy is available to the plaintiff and defendant equally in every type of action.*" (Emphasis supplied.)

Cleveland proceedings (pp. 295-96 of Cleveland Proceedings of Institute on Federal Rules):

> "The next feature I am to discuss is summary judgments. Rule 56 provides for summary judgments. Those judgments are judgments rendered in cases where there is no issue of fact to be tried. There are many cases which, in their earlier stages, seem to be such as to involve issues of fact, but which turn out to contain no issues whatever. In such cases summary judgments may be rendered when it appears in the case that there is in fact no issue to be tried. * * * *There is no restriction in the rules as to the types of case in which a summary judgment may be applied for.* * * * In New York they have been extending the scope of summary judgment proceedings, and they have included equitable actions for foreclosure of liens or mortgages, specific performance and accounting. *.Under Rule 56 of the new federal rules there is no restriction whatever. It can be used in any type of action.*" (Emphasis supplied.)

In accordance with this interpretation of the summary judgment rule, numerous decisions have held it applicable in stockholders' derivative suits against directors of their corporations for alleged neglect or breach of duty on the part of the directors; the following cases, all of which have been cited above, are appropriate examples: *Fox* v. *Johnson & Wimsatt,* 127 F. (2d) 729 (1942); *Toebelman* v. *Missouri-Kansas Pipe Line Co.,* 130 F. (2d) 1016 (C. C. A. 3rd, 1942); *Lopata* v. *Handler,* 37 F. Supp. 871 (E. D. Okla., 1941).

The other fallacious assumption which appears to be implicit in petitioners' argument is that the summary judgment rule is not applicable if either party should object to its application (see discussion at bottom of page 13 of petition). This assumption, if sound, would obviously make a nullity of the summary judgment rule,

since any party who was unable to contravert the facts stated in the affidavits filed under that rule and who recognized the weakness of his legal position could defeat the application of the rule and insist on a trial, for the purpose of merely "fishing" for evidence, by simply objecting to the application of the rule. That the rule is not subject to being defeated merely by the whim of either party, and is not rendered inapplicable merely because of the possibility that controverting evidence *may* be produced by the opposing party at a trial, although he is not able to produce affidavits in support of his position, has been clearly pointed out by Circuit Judge Clark, who speaking for the Second Circuit Court of Appeals in *Engl* v. *Aetna Life Insurance Company,* 139 F. (2d), 469 (1943), said (pp. 473 of 139 F. (2d)):

> "In the present case we have from the plaintiff not even a denial of the basic facts, but only in effect an assertion that at trial she may produce further evidence * * *. If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions."

This expression of Judge Clark squarely meets the petitioners' situation in this case. Petitioners have shown that they have no evidence or statements of specific facts to offer in support of their allegations, and that, as Judge Bard has said, when those allegations are stripped of the fallacious legal arguments which petitioners have ad-

vanced in conjunction with them, they are entirely without factual support (424a). Petitioners' insistence upon a trial represents nothing more than an attempt to "fish" for evidence to make up for their own lack of it. If the summary judgment rule is not applicable in such a situation, then it is without meaning or effectiveness.

It follows from what has been said above that the courts below did not err in holding the summary judgment rule applicable in this case.

II. The Question of Law, Which Was the Sole Question Presented Upon Respondents' Motion for Summary Judgment, viz., Whether or not the Directors Acted Properly in Approving the Settlement Agreement, Calls Merely for the Application of Common Law Tort Principles, Under the Applicable Local Law, as to Which There is no Dispute, and Therefore no Issue Worthy of the Attention of this Court is Presented.

It has already been shown that the question on the merits of this case is simply whether or not the directors of The Pennsylvania Railroad Company acted properly and within the legitimate limits of their discretion as directors in approving the agreement of settlement with Pennroad. In determining this question, the Federal Courts, whose jurisdiction in this case has been invoked solely on the ground of diversity of citizenship, must be governed entirely by the tort principles of the law of Pennsylvania, where the directors met and acted and where the settlement agreement was enterd into (see *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817 (1938); *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, 58 S. Ct. 860 (1938); *Guaranty Trust Co. of New York* v. *York,* 326 U. S. 99, 65 S. Ct. 1464 (1945).

There is no dispute here as to what law is applicable, or what the general principles of that law are. Petitioners raise no question, and could raise no question, as to the applicability of the law of Pennsylvania. Under

that law, the principles governing the liability of directors of a corporation and the extent of their discretion in settling litigation against the corporation are clearly established by a number of cases, of which the leading one is *Chambers* v. *McKee & Bros.*, 185 Pa. 105 (1898), where it was held that a settlement entered into honestly and in good faith by the directors of a corporation, with respect to litigation against it, is binding upon the corporation and all its stockholders, even though it may represent an error of judgment. The judges of the District Court and Circuit Court of Appeals below, trained in Pennsylvania law and sitting in Pennsylvania, applied those principles of Pennsylvania law to the undisputed facts of the present case and concluded not only that there was no fraud or bad faith on the part of the respondent directors in entering into the settlement agreement in question, but that those directors had reasonable and sufficient grounds for the settlement agreement. In that respect the District Court's opinion, which was adopted by the Circuit Court of Appeal, concluded that "from the affidavits it is apparent that these factors [*i. e.*, the factors bearing on the advisability of entering into the settlement agreement] were fully discussed at the Board meetings and they sufficiently indicate that the directors, in approving the settlement, were acting in good faith and what they thought was the best interest of the railroad" (5 F. R. D. 10). The court further concluded that the petitioners' legal assumptions, which it found to have no support in the law, formed the core of the charge against respondents, and "if these fallacious legal conclusions, which were alleged as facts in the complaint, are discarded, as they must be, the allegation of fraud and neglect of duty is stripped of its factual support" (5 F. R. D. 10).

Accordingly, there is no occasion for this Court to undertake to review this application of the local common law tort principles to the undisputed facts. No question of important public policy or of the interpretation of the

Federal Constitution or a Federal statute is involved, and there is therefore no reason for this Court to divert its attention from the many matters of much greater importance which are constantly before it, for the purpose of reviewing this case.

CONCLUSION.

For the reasons above stated, it is submitted that the petitions for certiorari herein should be denied.

Respectfully submitted.

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